Filed 12/1/08 Malibu Broadbeach v. City of Santa Monica CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MALIBU BROADBEACH, L.P., Plaintiff and Appellant, v. CITY OF SANTA MONICA et al., Defendants and Respondents.	B203164 (Los Angeles County Super. Ct. No. SS013394)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed.

Westlake Law Group, Julian A. Simonis for Plaintiff and Appellant.

Marsha Jones Moutrie, City Attorney, Joseph Lawrence, Assistant City Attorney, Ivan O. Campbell, Deputy City Attorney, for Defendants and Respondents.

Appellant Malibu Broadbeach L.P. (hereinafter, MBLP) filed a petition for a writ of administrative mandamus seeking both monetary damages and an order that respondents City of Santa Monica and its City Council and Planning Division (hereinafter collectively referred to as the City) issue a resolution reversing and removing a stop-work order issued by its building inspector. The trial court sustained without leave to amend the City's demurrer to the petition. We affirm because MBLP's sale of the real property in question deprived it of standing to complain of the stop-work order, and money damages cannot be recovered unless other grounds exist for issuance of the writ.

FACTUAL AND PROCEDURAL SUMMARY

In 1999, MBLP submitted to the City a set of plans for a four-story, single-family residence on property it owned located on Palisades Beach Road in Santa Monica. MBLP proposed to remodel an existing single-story structure by adding a three-story addition. Because the proposed project did not conform to zoning and density requirements, MBLP applied for and received a variance. In May of 2000, the City's Architectural Review board issued a permit, and then in September of 2000, the City issued a building permit authorizing construction on the project.

In September of 2001, MBLP began the demolition process to the existing structure, which resulted in removal of most of the structure's foundation. In March of 2002, a special inspector from the City verified the project's 50 percent remodel status and its compliance with the City's requirements. However, on Otober 25, 2002, the supervising inspector from the City's Planning Division visited the property, disagreed with the special inspector, and concluded that the previously approved work constituted a substantial remodel of the building in violation of the authorized plans. The City's Planning Division issued an inspection correction notice and ordered MBLP to stop work on the project. The basis for the stop-work order was that all of the existing foundation

had been removed, except for the west exterior wall, and that the project thus constituted a "substantial remodel" under the City's applicable codes.[1]

On October 28, 2002, MBLP's architect appealed the stop-work order and requested a hearing. On December 9, 2002, the City's building officer denied the appeal and found that the stop-work order was correctly issued because the project was a "substantial remodel" and violated planning and zoning requirements. As a result, for any construction to continue the entire structure would have to be brought into conformity with all current building codes. The written notice denying MBLP's appeal also advised MBLP that "[t]his decision is final . . . and is not subject to further administrative appeal, [and that] [t]he time within which judicial review of this decision must be sought is governed by Code of Civil Procedure Section 1094.6."

Nonetheless, MBLP filed a second administrative appeal, asserting a claim of estoppel and requesting a second hearing. On December 19, 2002, the City's building officer presided over an informal second hearing. The building officer made no findings. The building officer stated that he had no authority to retract the stop-work order, and he suggested that the City Council could consider MBLP's estoppel claim not as an administrative appeal but in the context of an anticipated lawsuit.

On January 14, 2003, the City Council met in a closed session to consider MBLP's estoppel claim in the context of anticipated litigation and the possibility of a settlement and release agreement, but the matter was not resolved. Thereafter, intermittent and unsuccessful settlement negotiations between the City and MBLP ensued for almost two

---

[1] The Santa Monica Municipal Code defines a "substantial remodel," in pertinent part, as follows: "A substantial remodel involves the removal, in whole or part, of a structure. A structure shall be deemed to have been substantially remodeled or demolished if at least fifty percent of exterior walls have been removed or relocated for any duration of time. A substantially remodeled or demolished structure shall lose any legal, non-conforming status which it may have had and may only be replaced or rebuilt if the entire structure is made to conform to all current, applicable Zoning Code requirements, including, but not limited to, setbacks, height and parking."

years. Near the end of this two-year negotiation period, in October of 2004, the City Planning Department declared the project a nuisance and required MBLP to demolish the structure, which it did. The last negotiation effort between the parties occurred at a meeting in November of 2004.

On December 29, 2004, MBLP wrote to the City and confirmed that there was no prospect of a settlement. MBLP also demanded that the City within 10 days either settle the matter on previously discussed terms, or formally deny its appeal so that it could seek judicial intervention. The City did not respond.

On April 21, 2005, approximately 29 months after the City issued its final decision on the appeal of the stop-work order and approximately five months after negotiation efforts ended with no prospect of settlement with the City, MBLP filed its petition for writ of administrative mandamus with the superior court. On March 22, 2006, MBLP sold all of its interest in the real property at issue on Pacific Beach Road to a third party for $1,275,000.

Thereafter, the City demurred to the petition on several grounds and requested judicial notice, inter alia, of a grant deed reflecting the sale of the Pacific Beach Road property. The City alleged (1) that MBLP lacked standing because it sold the property, (2) that the sale rendered the petition moot, and (2) that the petition was barred by the statutory limitations period which requires that a petition challenging a local agency's decision must be filed no later than 90 days "following the date on which the decision becomes final." (Code Civ. Proc., § 1094.6, subd. (b).)[2] The trial court granted the request for judicial notice of the grant deed, concluded that MBLP had no standing to seek the relief requested, and sustained the demurrer without leave to amend.

The trial court entered judgment in favor of the City, and MBLP appeals.

---

[2] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

DISCUSSION

Contrary to MBLP's contention, the trial court correctly sustained the demurrer without leave to amend because MBLP lacks standing to pursue writ relief. MBLP's petition cannot allege facts establishing its standing in this action, and it therefore fails to state a cause of action.

(A.) The standard of review.

A demurrer tests the legal sufficiency of the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) On appeal from a judgment after an order sustaining a demurrer, our standard of review is de novo; i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43.)

We deem true all material facts properly pled (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591), as well as those facts that may be implied or inferred from those expressly alleged (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403) or facts subject to judicial notice (*Lincoln Property Co., N.C., Inc. v. The Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 911). "[A] pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) If a petition for writ of mandate reveals that the petitioner lacks standing to sue, the petition is vulnerable to a general demurrer on the ground that it fails to state a cause of action. (See *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.)

While a decision to sustain or overrule a demurrer is subject to de novo review on appeal, a grant or denial of leave to amend calls for an exercise of discretion on the part of the trial court. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) Denial of leave to amend is reviewed for abuse of discretion. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) The trial court abuses its discretion in denying leave to amend only if the plaintiff shows a reasonable possibility of curing any defect by amendment. (*Ibid.*)

Guided by these principles, we now turn to whether the petition for a writ of administrative mandamus was adequate and should have survived the demurrer.

(B.) MBLP's sale of the real property in question deprived it of standing to complain of the stop-work order.

"Standing is a jurisdictional issue that may be raised at any time in the proceedings." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232 (*Waste Management*).) The question of standing goes to the existence of a cause of action and focuses on whether the party has a right to relief in court. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd.* (1999) 75 Cal.App.4th 327, 331.)

The requirement of standing applies to an action seeking a writ of mandate. (*Carsten v. Psychology Examining Com.*, *supra*, 27 Cal.3d at p. 796; *Parker v. Bowron*, *supra*, 40 Cal.2d at p. 351.) As specified in section 1086: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of *the party beneficially interested*." (Italics added.)

Thus, the statutory requirement that the petitioner be "'beneficially interested'" means that writ relief may be obtained "only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com.*, *supra*, 27 Cal.3d at p. 796.) In other words, the general rule is that "the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." (*Waste Management*, *supra*, 79 Cal.App.4th at p. 1232.)

In the present case, MBLP is not a beneficially interested party and thus does not have standing to complain about the City's administrative actions affecting the real property. This is because MBLP sold its interest in the property. It then had no "direct" and "substantial" interest in the outcome of the case, or any interest that was "special in the sense that it is over and above the interest held in common by the public at large."

(*Waste Management, supra,* 79 Cal.App.4th at p. 1233.) As the trial court aptly noted, issuance of the writ would be an "ineffectual act" and "would have no effect whatsoever" in any beneficial way for MBLP. (See *Nowlin v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1529, 1537.)

MBLP cannot allege any substantial injury that it will suffer if the City does not reverse the order that MBLP stop work on a project it no longer controls and no longer owns. Moreover, it would be a meaningless gesture for the City to reverse a stop-work order on a project that no longer exists on real property in which MBLP has no beneficial interest. The trial court thus properly concluded that the writ relief requested "no longer has any application" to MBLP and "would serve no useful purpose." (See *Grant v. Board of Medical Examiners* (1965) 232 Cal.App.2d 820, 827.)

Contrary to MBLP's assertion, the situation presented in *County of San Luis Obispo v. Superior Court* (2001) 90 Cal.App.4th 288 (*Munari*), is analogous and instructive. In *Munari,* the landowner petitioner was divested of all interest in the property as a result of a foreclosure sale prior to the completion of judicial review of the administrative action affecting the property, and the appellate court found that he had lost standing to obtain judicial relief. (*Id.* at pp. 292-293.) Although MBLP notes various factual and procedural differences between *Munari* and the present case, the bottom line is the same in both situations: the sale of the subject property (a fact which cannot be cured by leave to amend) divested the former owner of all legal interest in the case and resulted in a lack of the necessary standing to litigate an administrative action affecting the property.

(C.) ***Money damages cannot be recovered because other independent grounds do not exist to support issuance of the writ.***

MBLP's sole interest in this appeal is pecuniary. Its petition for writ relief sought both a reversal of the stop-work order and monetary damages. However, money damages can be awarded in a petition for a writ of mandate only if other grounds (other than money damages) warrant issuance of the writ. As set forth in section 1095, "*If judgment be given for the applicant*, the applicant may recover the damages which the applicant

has sustained . . . and a peremptory mandate must also be awarded without delay." (Italics added.) As the court in *Adams v. Wolff* (1948) 84 Cal.App.2d 435, 439, stated, "If the judgment is otherwise correct, there can be no doubt of the propriety of thus awarding a money judgment in a *mandamus* proceeding where other grounds for the issuance of a writ of mandate exist."

MBLP erroneously contends that money damages can be recovered even if no other writ relief is mandated. For this faulty notion MBLP cites several cases which, however, are readily distinguishable and do not support its conclusion. In *Poschman v. Dumke* (1973) 31 Cal.App.3d 932 (*Poschman*), disapproved of on other grounds in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, fn. 3, the appellate court found that an action by a state college professor seeking damages and other relief for the wrongful denial of tenure was not rendered moot by the grant of tenure almost two years after it should have been granted, because the professor was still entitled to additional salary, service benefits, and consideration for promotion that were dependent on the length of tenure. Thus, the demurrer to the professor's petition for writ of administrative mandamus was erroneously sustained. The matter was sent back to the trial court not only to consider the monetary issue of lost salary and any special damages, but also to restore any lost "service benefits" the professor could have accrued. (*Poschman, supra*, at pp. 943-944.) Restoration of such service benefits was subject to relief granted by writ of mandate, thus rendering additional recovery for monetary damages proper under section 1095.

Similarly, in *Warner v. North Orange County Community College Dist.* (1979) 99 Cal.App.3d 617 (*Warner*), the court reversed a judgment dismissing a petition for writ of mandate by a terminated teacher who alleged equitable estoppel and sought "reinstatement, pay, and benefits" to which he would otherwise have been entitled. The court held as follows: "Although it would be inappropriate to order plaintiff reinstated for a semester's work after four years have elapsed, he should not be precluded from seeking damages for the loss of that semester's employment. Damages may appropriately be awarded in mandamus proceedings." (*Id.* at p. 628, citing section 1095

& *Adams v. Wolff, supra,* 84 Cal.App.2d 435.) The court reversed and permitted plaintiff to proceed to trial on a cause of action for damages on the theory of equitable estoppel for the loss of employment. (*Id.* at p. 628.) Although the court in *Warner* may not have discussed the matter with the utmost clarity, it is apparent that as in *Poschman*, the recovery sought included restoration of lost benefits, which is a proper ground for mandamus and could thus support the additional claim for monetary damages.

Equally unavailing is MBLP's reliance on *LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770 (*LT-WR*). In *LT-WR*, a developer whose application for a coastal development permit was denied sought a writ of mandate and claimed monetary damages, premised on the theory of a governmental taking of property. The appellate court held that the monetary damages portion of the lawsuit was improper not because it was moot, as the trial court had found, but rather because it was not yet ripe for consideration because the agency had not made a final decision. (*Id.* at pp. 801-802.) According to MBLP, this is relevant because it confirms MBLP's position that its claim for monetary damages is not, as a matter of law, rendered moot by whether or not it has standing to pursue writ relief. However, *LT-WR* does not support MBLP's position because the court's jurisdiction under section 1095 was never addressed, and an opinion is of course not authority for an issue not considered. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1071; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Accordingly, under the circumstances of the present case, MBLP is precluded from seeking money damages in its petition for a writ of administrative mandate.

(D.) Other issues.

The City also claims that MBLP is precluded from seeking damages until it exhausts its judicial remedies. Specifically, the City argues that MBLP's inability to attack in court and set aside the administrative decision complained of gives that decision res judicata effect and a finality which precludes a subsequent action for damages. (See *Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 767-768.)

Finally, the City argues that MBLP's administrative mandamus action is barred by the 90-day limitations period (§ 1094.6, subd. (b)), which commenced running on December 9, 2002, when the City sent notice advising of its "final" decision denying the appeal of the stop-work order and declaring the matter was "not subject to further administrative appeal." The City also notes that even equitable tolling based on estoppel could not save the case from the statute of limitations, because the tolling time periods (attributable to the second appeal hearing and to the lengthy settlement negotiations) would still not tack on enough time. (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370-371.)

However, in view of the previously discussed fatal lack of standing to complain about the stop-work order due to the sale of the property and MBLP's consequent inability to seek monetary damages in a petition for writ of mandate, it is unnecessary to discuss the City's other arguments noted above. The trial court properly sustained without leave to amend the demurrer to the petition.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.